ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

LAXMIBAI, APPELLANT (PLAINTIFF), *v.* RADHABAI, RESPONDENT (DEFENDANT).*

1917. *December* 3.

Costs—Successful party not to be deprived of costs unless guilty of misconduct, omission or neglect—Discretion of lower Court interfered with, when facts were misapprehended and the established principle violated—Costs occasioned by unnecessary printing at the instance of attorneys, payable by attorneys personally.

A Hindu, Maratha by caste, died possessed of property worth about Rs. 3,000. His widow, the plaintiff, sued the defendant claiming to be another widow of the deceased for a declaration that the latter though living with the deceased was not entitled to the rights of a Hindu wife, but was according to the custom of the community entitled to maintenance out of the estate of the deceased. The trial Judge decided against the defendant and referred the suit to the Commissioner to take an account of the estate of the deceased and for an inquiry as to the proper amount to be allowed to the defendant for maintenance. Before the Commissioner the quantum of maintenance was agreed by consent of parties, but the defendant put in a claim for ornaments which was disallowed. The Commissioner made his report and the suit then came up for further directions and costs before a Judge who was not the trial Judge. It was represented to him on behalf of the defendant that the suit was necessary and that costs should come out of the estate. The plaintiff submitted that the estate was small, that the defendant never had any case and had lost all along the line and that although the plaintiff would be justified in asking for costs against the defendant she would not do so as nothing could be got from the defendant. The learned Judge thought that the plaintiff was more in fault than the defendant and ordered the costs to come out of the estate. The plaintiff appealed.

Held, (1) that there had been a misapprehension of facts on the part of the learned Judge who made the order of costs and a violation of the established principle by throwing upon the plaintiff the costs of the unsuccessful defendant where the plaintiff had been guilty of no misconduct.

(2) that the order as to costs out of the estate must be deleted, and the defendant be made to bear her own costs.

* *Appeal No.* 20 *of* 1917 : *Suit No.* 742 *of* 1916.

1917.

LAXMIBAI v. RADHABAI.

Cooper v. *Whittingham*[1], *Kuppuswami Chetty* v. *Zamindar of Kalahasti*[2] and *Ranchordas Vithaldas* v. *Bai Kasi*[3], referred to.

Costs occasioned by the unnecessary printing of certain matter at the instance of parties' attorneys were made payable by the attorneys personally, and not allowed to fall upon the clients.

COSTS :

One Dhaku Sakharam, by caste a Maratha, died intestate in Bombay on the 8th October 1915, possessed of property worth about Rs. 3,000. The plaintiff was the widow of the deceased married according to the *Shastras*. The defendant belonged to a caste lower than that of the deceased and lived with the deceased according to the custom of *pat* arrangement recognised by the Maratha community. The plaintiff alleged that no marriage was possible between the defendant and the deceased especially as she was twice married before and one of her husbands was alive, but that the defendant was according to the said custom entitled to maintenance out of the property of the deceased until she formed some other connection.

The defendant contended that she was a co-widow of the deceased married to him about one year before his death and that she and the plaintiff were the heirs of the deceased according to Hindu law and as such joint owners of his estate.

The suit was decided by his Lordship Kajiji J. against the defendant and referred to the Commissioner "to ascertain the estate left by the deceased and what should be allowed as proper allowance for defendant's maintenance."

Costs and further directions were reserved. Before the Commissioner, the quantum of maintenance was agreed by consent of parties at Rs. 7-8-0 a month. The

(1) (1880) 15 Ch. D. 501. (2) (1903) 27 Mad. 341.
(3) (1892) 16 Bom. 676 at p. 682.

defendant, however, put in a claim for ornaments which the Commissioner disallowed.

The Commissioner having made his report, the matter came up for further directions and costs before Beaman J. who had not tried the suit on merits. It was represented to him that the issue of marriage had occupied a short time, that a suit was necessary and that costs should come out of the estate. On behalf of the plaintiff it was stated that the estate was small, that the defendant never had any case at all and had lost all along the line and that although the plaintiff might as a matter of right ask for costs against the defendant she would not do so as nothing could be got from the defendant. The learned Judge thought that the plaintiff was more in fault than the defendant and ordered the costs to come out of the estate.

His Lordship observed as follows :—

"I think that the defendant should have her maintenance from date of suit and costs out of the estate, and that her maintenance should be made a charge on the immoveable property. I do not wonder that Mr. Bahadurji characterised the suit in the strongest terms as a glaring example of an attorney's suit, but it turned out to be her own rather than the other attorneys who were deserving of this castigation."

The plaintiff appealed.

Kanga with *Munshi*, for appellant.

Mirza, for respondent.

SCOTT, C. J. :—This suit was filed by the widow of Dhaku Sakharam against the defendant claiming to be entitled to sole possession and enjoyment of the estate of the deceased during her lifetime, subject only to a right of maintenance of the defendant. It was alleged by the plaintiff that the defendant was a woman living with the deceased who was not entitled to the rights of a Hindu wife, and that on the death of the deceased she was only entitled to maintenance out of the property until she formed some other connection. The

1917.

LAXMIBAI v. RADHABAI.

prayer was that it might be declared that according to the custom of the community the defendant was only entitled to provision being made for her maintenance out of the estate of the deceased; that the plaintiff was solely entitled as a Hindu widow; that the defendant might be ordered to discover and hand over to the plaintiff the property now in her possession or power belonging to the estate of the deceased including the title deeds of the Panvel property; and that it might be declared that the ornaments did not form part of the estate of the deceased, but formed part of the *stridhan* property of the plaintiff. Then there was a prayer for injunction and Receiver.

The defendant put in a written statement claiming to be a co-widow of Dhaku Sakharam, and joint owner of his estate with the plaintiff. An application was made by the plaintiff for a Receiver to take charge of the property in the possession of the defendant and belonging to the estate of the deceased, and it was admitted that the defendant was in possession of certain outstandings recoverable on account of the estate of the deceased. On that application by consent the parties deposited with their respective solicitors property in their possession pending the hearing and no further order, therefore, was made.

At the hearing the issue was in substance whether the defendant was, as she claimed to be, co-widow of the deceased, and that issue was decided against her.

A reference was then made to the Commissioner to take an account of the estate of the deceased, and an enquiry as to the proper amount to be allowed to the defendant for maintenance. Before the Commissioner by consent it was agreed that Rs. 7-8-0 should be allowed to the defendant for maintenance and the defendant put in a claim for certain ornaments, five in number, as to which evidence was led before the Commissioner,

but the claim was disallowed, and the Commissioner certified and reported that the immoveable properties belonging to the estate of the deceased were as shown in the Schedule to his report and that the title deeds were in the possession of Dubash and Co., attorneys for the defendant.

The matter then came up as to further directions and costs before Mr. Justice Beaman, who was not the trial Judge. It was represented to him on behalf of the defendant that the issue of marriage had only occupied a short time ; that a suit was necessary and that costs should come out of the estate. On behalf of the plaintiff it was stated that the estate was small, the defendant had never any case, and had lost all along the line, but they did not ask for costs against the defendant, because they could get nothing. The learned Judge, however, thought that it was the plaintiff's attorneys' suit. He characterised the suit in very strong terms, and thought that the plaintiff was more in fault than the defendant.

We have been taken through the whole of the proceedings up to the final decree which are printed in the Appeal Paper Book, and we have also been taken through various documents printed at the instance of one side or other very unnecessarily at the end of the Book and we have come to the conclusion that the plaintiff's counsel was right in contending before the learned Judge that the defendant had never any case at all and had lost all along the line. Under these circumstances we have to consider whether the order as to costs out of the estate which belongs exclusively to the plaintiff for her life should stand. In *Cooper* v. *Whittingham*[1], Sir George Jessel observed: "Where a plaintiff comes to enforce a legal right,

[1] (1881) 15 Ch. D. 501 at p. 504.

1917.

LAXMIBAI v. RADHABAI.

and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs." It is no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right and to say "If I had known of your right I should not have infringed it." These principles were given effect to in *Kuppuswami Chetty* v. *Zamindar of Kalahasti*[1]. In *Ranchordas Vithaldas* v. *Bai Kasi*[2], an Appellate Bench of this Court laid down that "The principle to be deduced from these decisions is that Appeal Courts should interefere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all." It appears that this is a case in which there has been a misapprehension of facts on the part of the learned Judge who made the order of costs and a violation of established principle by throwing upon the plaintiff the costs of the unsuccessful defendant, where the plaintiff has been guilty of no misconduct. The plaintiff did not ask for costs against the defendant, because she would get nothing. That was what was stated by her counsel in the lower Court, and we do not make an order against the defendant for the same reason now. But the order as to costs out of the estate must be deleted, for we do not think it is right in principle that the defendant should, under the circumstances of this case, have her costs out of the estate.

It remains to consider the costs occasioned by the unnecessary printing of the affidavit of Laxmibai and certain correspondence printed, it is said, at the instance of the defendant's attorneys. We think that

(1) (1903) 27 Mad. 341. (2) (1892) 16 Bom. 676 at p. 682.

1917.

LAXMIBAI v. RADHABAI.

those costs must be paid by the attorneys personally and not be allowed to fall upon their clients.

Another matter is the Judge's order obtained for the amendment of the memorandum of appeal by the addition at the instance of the attorney for the plaintiff of a very unnecessary paragraph asking for relief in respect of a matter in which relief had already twice been asked for in the unamended memorandum. Costs of that Judge's order must not be costs in the cause, but must be paid by the plaintiff's attorneys personally. No order as to costs of this appeal. There was a consent order that all the property in the possession of both parties should be deposited with their respective solicitors. The property in the possession of the defendant's solicitors will not be subject to their lien for costs. They must, therefore, hand the property over to the plaintiff's attorneys, for and on account of the plaintiff.

Attorneys for the appellant: Messrs. *Pandia & Co.*

Attorneys for the respondent: Messrs. *Dubash & Co.*

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

1918.

January 9.

HARIRAM KISNIRAM (ORIGINAL DEFENDANT), APPELLANT *v.* SHIVABAKAS RAMCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Limitation Act (IX of 1908), Schedule I, Articles 120 and 144—Landlord and tenant—Tenant building on the land adjacent to the landlord's house—Staircase of the tenant's house supported by a pillar on the landlord's land—Injunction to remove the staircase—Trespass—Adverse possession—License.

* Second Appeal No. 803 of 1916.